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NO. 90-661

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL R. WOOD,

Petitioner,

v.

ALAMEDA COUNTY SUPERIOR COURT,
CITY OF HAYWARD, CALIFORNIA

Respondent.

CITY OF HAYWARD,

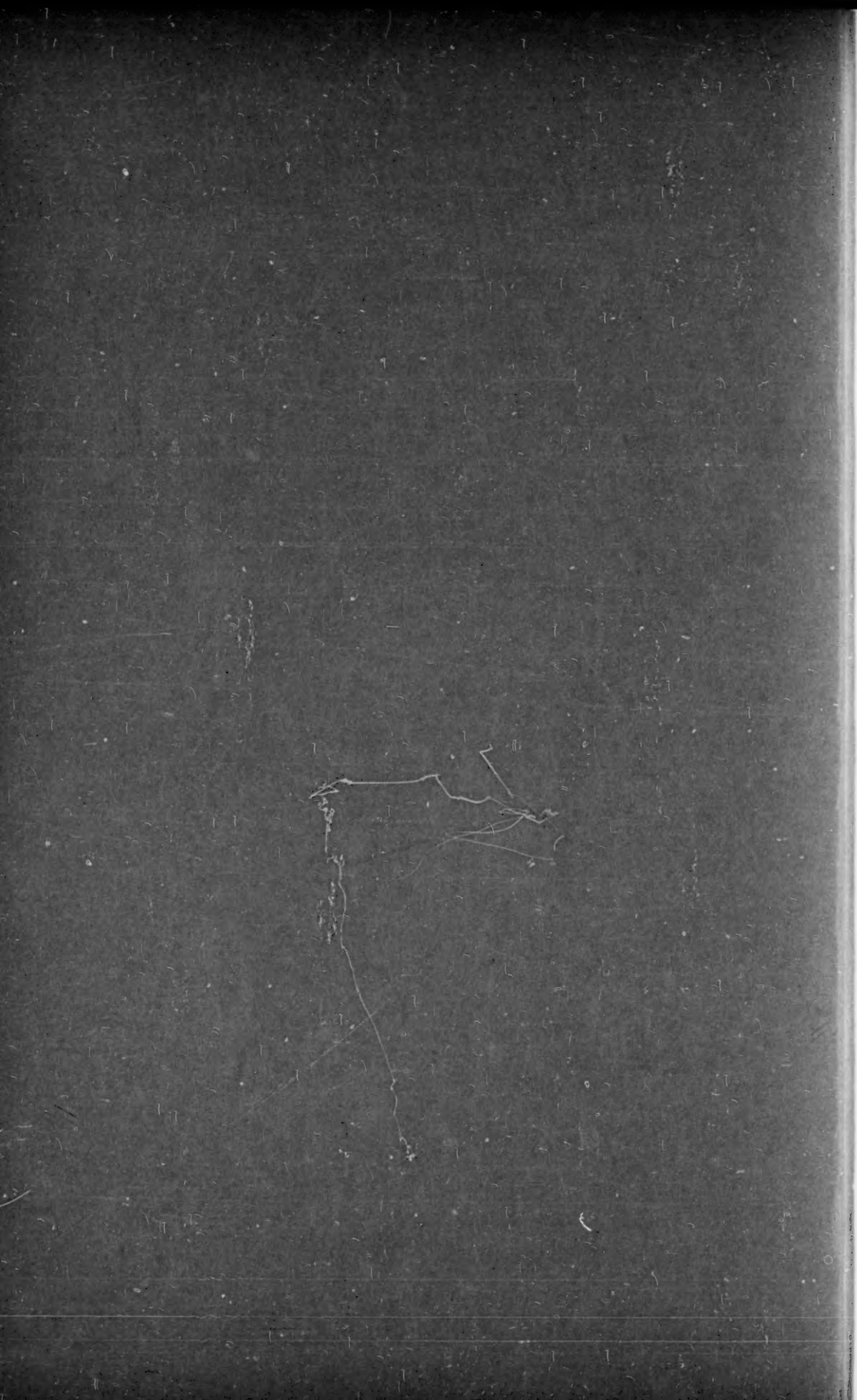
Real Party in Interest.

PETITION FOR A WRIT OF CERTIORARI
TO THE MUNICIPAL COURT OF THE
STATE OF CALIFORNIA, COUNTY OF ALAMEDA

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

DEBRA S. MARGOLIS
Deputy City Attorney II
Counsel of Record
ALICE C. GRAFF, City Attorney
Civic Center Building, Rm. 1135
22300 Foothill Boulevard
Hayward, CA 94544
(415) 581-2345 Ext. 5536

Attorneys for Real Party in
Interest, CITY OF HAYWARD



QUESTION PRESENTED

Does personal service of summons and complaint constitute adequate service of process?

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TABLE OF AUTHORITIES

Cases:

Cox Broadcasting Corp. v. Cohn
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Pennsylvania v. Ritchie
480 U.S. 39, 107 S.Ct. 989,
94 L.#d.2d 40 (1987) 2

Federal Statutory Provisions:

28 U.S.C. section 1257(a) 2
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JURISDICTION

Petitioner claims the court has jurisdiction to review this matter under 28 U.S.C. section 1257(a). That provision gives the court jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" The petition for writ of cer-

tiorari seeks review of an interlocutory judgment in a state court action. Although the interlocutory judgment is "final" within the meaning of 28 U.S.C. section 1257(a) (see Pennsylvania v. Ritchie 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975)), review of this judgment at this time is inappropriate because there is a final judgment in the underlying action. Thus, petitioner can seek review of his federal claims by appealing the municipal court judgment in state court. In fact, petitioner has recently filed a notice of appeal in state court. Petitioner can properly petition for review of this court once the California Supreme Court issues a final judgment or decree on the appeal. If this course of action were followed, all federal issues arising out of this action could be addressed in one petition for writ of certiorari.

STATEMENT OF THE CASE

This is an unlawful detainer proceeding that was initiated by the real party in interest, City of Hayward ("City") due to petitioner's failure to vacate leased premises at the Hayward Air Terminal after being served with a proper 30-day notice of termination of tenancy. Petitioner responded to the complaint by filing a motion to quash service of summons by substituted service of process. The motion was denied in the municipal court. Petitioner unsuccessfully sought review of the denial of his motion in the superior court, the appellate court and finally in the California Supreme Court.

In the meantime, petitioner was served a second time by personal service in the hopes of getting around the service of process issue. Once again, petitioner filed a motion to quash service of process. As with the first motion, the motion was denied in the municipal court and petitioner was denied

relief in the superior court, appellate court and the California Supreme Court. This petition seeks review of the denial of his second motion to quash service of summons. At the trial court level, petitioner argued the personal service was invalid because he was served in court while appearing at another hearing in this action. His arguments are completely devoid of merit. In addition, his arguments raise no federal issues whatsoever.

Petitioner failed to respond to the complaint after notice of entry of the California Supreme Court's order was served upon him. He apparently relied upon the mistaken assumption that there was an automatic stay of the action during the period of time within which he was required to file a petition for writ of certiorari with this court. (See, 28 U.S.C. § 2101(f) for proposition that there is no automatic stay of judgment pending review of petition for writ of certiorari.) Therefore, petitioner's default was entered for failure

to file a response. Subsequently, the City obtained a default judgment and writ of possession from the court. Petitioner then filed a motion to set aside the default. On October 3, 1990, the municipal court denied petitioner's motion and ordered that execution of the writ of possession would be stayed until October 31, 1990, conditioned upon petitioner's payment of all back rent due and owing by October 15, 1990.

Petitioner failed to pay the back rent by October 15, 1990, and he was physically evicted from the premises on October 17, 1990. Petitioner's motion for reconsideration of the motion to set aside the default was denied on October 24, 1990.

REASONS FOR DENYING THE WRIT

It is important to note at the outset that petitioner raises no significant issues of legal importance in his motion to quash service of summons. Aside from the fact that he raises no federal questions or issues, he also

raises no issues that have any significance to litigants other than himself and the City. This is simply not the type of action that warrants United States Supreme Court review.

A. The State Courts Have Not Erred in Ruling That Service of Process Was Proper in This Action

Petitioner's attempt to remove this action to federal court did not affect the personal service of process of the complaint. Removal of this action was never effected because the fundamental element of federal court subject matter jurisdiction was lacking (28 U.S.C. § 1441). Removal jurisdiction is only available when the federal court would have had original jurisdiction in the first instance. The action here is an unlawful detainer action between the City and petitioner raising issues of state landlord-tenant law. There is no federal question involved, no diversity of citizenship, and no other ground for federal jurisdiction. Accordingly, the action was

remanded back to the state court for lack of subject matter jurisdiction upon the federal court's own initiative.

B. This Court Should Deny the Petition for Writ of Certiorari Because it Seeks Review of Issues Not Raised in the Trial Court

Petitioner argues the notice of termination of tenancy in this action was invalid because it lacks a statement of reasons for the termination of his tenancy. He also argues the City improperly failed to exhaust administrative remedies before terminating his tenancy. These issues are affirmative defenses to the unlawful detainer complaint that could have been raised in the underlying action had petitioner filed a response on the merits. However, petitioner did not raise these issues below. Rather, he challenged the sufficiency of the method of service of process. Therefore, any review of these proceedings should be limited to the issues relating to service of process. Because petitioner was properly served by personal service, his

petition for writ of certiorari should be denied.

CONCLUSION

Because this action is an unlawful detainer action raising insignificant issues of state landlord-tenant law, it does not warrant review by the United States Supreme Court. In addition, three appellate courts have already reviewed the facts and circumstances relating to this petition and have determined that the trial court did not abuse its discretion in denying petitioner's motion to quash service of summons. Therefore, the City respectfully requests that this petition for writ of certiorari be denied.

DATED: November 20, 1990

Respectfully submitted,

ALICE C. GRAFF, City Attorney

By _____
Debra S. Margolis
Deputy City Attorney II
Counsel of Record
Attorneys for City of Hayward

